IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 78-216**

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

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**No. 78-217**

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

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**No. 78-270**

FEDERAL COMMUNICATIONS COMMISSION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



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Nos. 78-216, 78-217, 78-270

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UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND FEDERAL COMMUNICATIONS COMMISSION,
*Petitioners*

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
*Respondents*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether parties may frustrate an order of a court of appeals by implicitly conceding a critically important aspect of their case during judicial review and then, after denial of certiorari, asserting the matter as a

defense for their non-compliance with the judicial mandate?

## STATEMENT OF THE CASE

On July 28, 1977, the United States Court of Appeals for the District of Columbia Circuit reversed an order of the Federal Communications Commission requiring MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. to cease providing Execunet service to their customers. *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (1977), *cert. denied*, 434 U.S. 1040 (1978) (*"Execunet I"*).[1] On January 16, 1978, this Court denied certiorari as to *Execunet I*. Within hours after the denial, AT&T filed with the FCC a petition seeking a ruling that it was under no obligation to furnish the local interconnections that were absolutely necessary to make Execunet service work and began, effective immediately, to refuse further interconnections. A divided FCC granted the requested endorsement of AT&T's action on February 23, 1978.[2]

MCI immediately sought relief from the United States Court of Appeals for the District of Columbia Circuit by filing a motion for an order directing compliance with the court's mandate in *Execunet I*. On April 14, 1978, the court issued an order,[3] accompanied by a detailed opinion,[4] directing such compliance (*"Execunet II"*). Motions for rehearing and suggestions for a rehearing *en banc*[5] were denied, with no judge of the circuit court voting to grant such motions. The court also denied motions for a stay of its order pending disposition of

[1] AT&T App. 1i.

[2] AT&T App. 1c.

[3] AT&T App. 1d.

[4] AT&T App. 1a.

[5] AT&T App. 1e and 2e.



petitions for a writ of certiorari.[6] Applications for a stay pending disposition of the petitions for certiorari addressed to the Chief Justice of the United States, which were forwarded by him to the other Justices of this Court, were denied.[7] Petitions for certiorari were filed in August, 1978. The United States, a statutory respondent below, did not join in the FCC's petition.

### Background

MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C Inc. (collectively "MCI") are affiliated communications common carriers, operating a transcontinental system providing long distance business and data communications services among various metropolitan areas throughout the United States.

MCI's system is constructed to provide communications capacity only between MCI's in-city terminals and not beyond those terminals out to the points to which its customers wish their communications brought. In this regard, MCI is much like the Long Lines Department of AT&T, MCI's principal competitor in the provision of long distance, intercity communication services. AT&T Long Lines also relies upon local telephone companies, primarily subsidiaries of AT&T, to provide the required local interconnections between its in-city terminals and its customers' desired termination points. It would be both economically burdensome and wasteful to expect those carriers competing for the intercity communications market each essentially to duplicate the existing facilities of the local telephone companies. As a result of AT&T's ownership of the largest local telephone companies and its domination of the rest through revenue sharing agreements, the Long Lines Department has not

[6] AT&T App. 1b.

[7] Order of May 22, 1978.

experienced any difficulties in obtaining whatever local interconnections it requires. Long Lines' competitors, on the other hand, have been denied interconnections at certain critical times when AT&T has sought to limit the scope of competing intercity services.

**Earlier Litigation**

Microwave Communications, Inc. received certification in August, 1969 to construct a line between Chicago and St. Louis.[8] In that decision, the Commission recognized that MCI would require the use of local telephone company facilities to extend its intercity services to its customers. Despite AT&T's protests, the Commission held that the issuance of an order requiring the existing carriers to provide such local distribution services would be in the public interest.[9]

Thereafter, the Commission received numerous applications for certification of additional lines from other potential competitors of AT&T. Rather than handling each of these applications on a case-by-case basis, the Commission instituted a rulemaking (the "*Specialized Carrier*" proceeding) to decide a number of general policy questions raised by the applications, including "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; . . ." and, if such entry were permitted, "[w]hat is the appropriate means for local distribution of the proposed services?"[10] The FCC specifically found that a "general policy in favor of the

[8] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsideration denied*, 21 FCC 2d 190 (1970).

[9] 18 FCC 2d at 965.

[10] *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules* (Docket No. 18920) Notice of Inquiry, 24 FCC 2d 318, 327 (1970).



entry of new carriers in the specialized communications field would serve the public interest, convenience and necessity."[11] The Commission also held that the established carriers should permit interconnection with the new carriers and reinforced this holding with a reminder that the Commission would not condone any practice whereby any established carrier discriminated in favor of an affiliated carrier with respect to such interconnection.[12]

During the pendency of the *Specialized Carrier* proceeding, the Commission instituted another related rulemaking to consider a proposal that all carriers, before instituting new services on existing facilities, be required to obtain prior Commission consent. After deliberation, the FCC concluded, to the contrary, that both the established and new carriers should be free to institute new service offerings merely by filing tariff revisions, rather than being required to obtain prior authorization from the Commission.[13]

[11] *Establishment of Policies and Procedures for Consideration of Applications to Provide Specalized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules* (Docket No. 18920), 29 FCC 2d 870, 920 (1971), *reconsideration denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[12] 29 FCC 2d at 940.

[13] *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities* (Docket No. 19117), 39 FCC 2d 131 (1973). The Commission stated, at 135, that:

> In connection with possible revisions of our tariff rules, we recognize that the termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions properly supported by the cost and other data required by Part 61 and otherwise in conformity with our rules.

During 1972 and up to mid-1973, while it was building its initial system, MCI engaged in extensive negotiations with AT&T to obtain adequate local interconnection. By the fall of 1973, however, it was clear that AT&T would not provide MCI with local interconnections required for certain services, including a private line service known in the industry as "foreign exchange" or "FX". FX is a service which gives a customer in one city a line to a distant city which terminates in a business telephone arrangement in a telephone central office there. This gives the subscriber access to the local exchange in the distant city. For example, if a businessman in Washington subscribes to FX service to New York, he can reach all the telephone subscribers in New York City—and can, in turn, be reached by all of them.

To resolve the local interconnection dispute, the FCC initiated a show cause proceeding against AT&T in December, 1973. Relying upon the *Microwave Communications, Inc.* and *Specialized Carrier* proceedings, the Commission reaffirmed AT&T's obligation to furnish MCI and other specialized carriers with the local facilities needed for the rendition of all their authorized services, including FX.[14] The Commission explained that:[15]

> Our orders herein therefore make clear that Bell is to provide interconnection facilities *for all of the authorized services of the specialized carriers, including FX and CCSA.*

Specifically, the Commission ordered Bell to cease and desist from the following practices, among others:[16]

[14] *Bell System Tariff Offerings* (Docket No. 19896), 46 FCC 2d 413 (1974), *aff'd, Bell Telephone Company* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[15] 46 FCC 2d at 427 (emphasis added). "CCSA" (common control switching arrangements) service—for large businesses—was also specifically at issue in Docket No. 19896.

[16] 46 FCC 2d at 439 (emphasis added).



(a) Engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers *for their presently or hereafter authorized interstate and foreign communications services*;

* * * *

(c) Implementing any policy or practice which results in denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers.

The Third Circuit affirmed the cease and desist order in the *Bell Telephone* case.[17]

**The Execunet Case**

On September 10, 1974, MCI filed a tariff revision to institute a new category of specialized metered use services, which included the service commercially known as Execunet. Execunet is essentially a variation of FX service, the major difference between the two being that Execunet subscribers share groups of FX facilities instead of leasing one or more for their own exclusive use. Execunet subscribers are charged on a time and distance sensitive basis, with a minimum charge of $75.00 per month being assessed in addition to a monthly charge for the interconnection supplied by the local telephone com-

[17] *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). Note that, despite the fact that the underlying *Specialized Carrier* decision was then under review in the Ninth Circuit, AT&T nevertheless chose to appeal in the Third Circuit. This was inconsistent with Bell's new argument advanced in its petition here that the Hobbs Act limits jurisdiction to the circuit where a related case is being, or was, considered.

panies which averages approximately $25.00. Execunet service is available to only a limited number of cities on a thirty-day commitment basis. Subscribers are given identification codes that permit MCI's computerized equipment to identify them as "authorized" to use the service.

Insofar as required local interconnection is concerned, it is important to note Execunet service employs exactly the same type of local telephone company interconnection facilities as does conventional FX service. MCI merely uses these interconnections in a more efficient manner through sharing. The identity between FX and Execunet local interconnection facilities makes it clear that AT&T's real quarrel is not with respect to the facilities requested but rather the use to which MCI intends to put them.

In the spring of 1975, AT&T began a surreptitious campaign of *ex parte* presentations to members of the Commission and its staff against MCI Execunet service.[18] In May, AT&T sent to the FCC a very brief informal letter of protest.[19] Without having even given MCI an

[18] MCI knew nothing of this campaign at the time, but learned of it later. After repeated, but largely unsuccessful, attempts by MCI to put the full facts as to AT&T's *ex parte* meetings on the record of this case, it is now known from subsequently submitted affidavits: (1) that AT&T argued its case forcefully; (2) that there was an arrangement between AT&T and representatives of a major non-Bell telephone company to obtain an Execunet authorization code for use in offering demonstrative evidence regarding Execunet to members of the Commission; (3) that one of the parties to this arrangement stated: "We will bury MCI"; and (4) that at least one individual who occupied a decision-making position with the Commission made a remark showing that he had been influenced into reaching a firm, adverse judgment against MCI. The unprecedented celerity with which the Commission acted in 1975 also makes obvious the effectiveness of AT&T's *ex parte* presentations. Even now, however, MCI does not know all the arguments AT&T advanced since the Commission has rejected every attempt by MCI to find out.

[19] The Commission labeled this an informal complaint. When MCI refused to satisfy the complaint, AT&T's only legal recourse



opportunity to respond to AT&T's *ex parte* communications, the Commission issued a peremptory letter rejecting MCI's Execunet tariff revisions.[20] MCI immediately appealed and was granted a stay by the Court of Appeals for the D.C. Circuit. The Commission then asked the D.C. Circuit to hold the appeal in abeyance while it reconsidered its decision. After it issued its second decision in 1976,[21] which attempted to bolster its 1975 letter order, the Commission joined AT&T in seeking dissolution or modification of the court's stay. AT&T sought protection from what it called the "continuing and ever-increasing diversion of MTS"[22] and expressed the gravest concern about "the drastic scope of MCI's threatened expansion."[23] It produced an affidavit detailing the numerous local exchange interconnections it was providing for Execunet.[24] As a result of such representations, the court

under 47 C.F.R. § 1.721 *et seq.* was to file a formal complaint. It never did so—and the Commission did not require it to comply with the rule—with the result that MCI was effectively denied an opportunity to respond adequately in accordance with the Commission's rules.

[20] 60 FCC 2d 62 (1975).

[21] *MCI Telecommunications Corporation*, 60 FCC 2d 25 (1976).

[22] Motion of AT&T to Dissolve or Modify the Stay and For Expedited Review dated August 18, 1976, p. 22. MTS (message telecommunications service) is AT&T's ordinary long distance telephone service.

[23] Reply of AT&T dated November 6, 1975, p. 4. AT&T explained, at page 15 of its Reply, that:

> Since the expansion plans involved the installation of new local exchange lines in most of the cities beginning in November (*id.* para. 7), AT&T urgently filed its motion by the end of the same week in order to give MCI an opportunity to respond, and the Court an opportunity to act, before MCI initiated substantial Execunet service. . . .

[24] Affidavit of Paul E. Muench dated August 18, 1976, appended to AT&T's motion of the same date.

modified its stay so as to prevent further expansion of Execunet prior to decision on the merits.

Upon consideration of the merits in *Execunet I*, the court reversed the agency's decision. The court held that the *Specialized Carrier* decision must be read broadly and that MCI's existing certifications under Section 214 of the Communications Act[25] permitted it to furnish Execunet service. The court held that only if the Commission has made a determination that the public convenience and necessity require that new services receive advance approval can it reject such a new service. It left to the Commission the opportunity to consider, in a future proceeding, whether the public interest might require such a finding.[26]

In petitioning for certiorari, AT&T made the following representations to this Court:[27]

> If the lower court's decision stands, the telephone companies will be threatened with a *massive diversion* of MTS traffic from the switched network. *This diversion can occur at an extraordinary rate—literally in a matter of months*—because the specialized carriers have thousands of intercity circuits in operation and *they utilize existing local distribution facilities already in place.* Past experience confirms the severity and speed of this threat.

[25] 47 U.S.C. § 214.

[26] MCI had argued not only that its certifications were not subject to pre-existing service limitations, either explicit or implicit, but also that, even if it were assumed *arguendo* that MCI were limited to "private line" service or "specialized" service, Execunet would fall within either of those categories. MCI also argued that it had been deprived of its due process rights in view of the undisclosed nature of AT&T's *ex parte* presentations and in view of the FCC's curtailing of its normal hearing processes. These arguments were rendered moot when the lower court reached its decision that there were in fact no pre-existing conditions on MCI's facility certifications. Despite the fact that *Execunet I* vacated the agency orders under review, however, petitioners here persist in returning to them to contend that Execunet is properly classifiable as "MTS" rather than "private line" or "specialized" service. That contention has been refuted by extensive affidavits and analyses which had been impermissibly ignored by the agency in the decisions the court invalidated. This is one illustration of the attempt by petitioners to circumvent the *Execunet I* decision.

[27] AT&T Petition for a Writ of Certiorari of September, 1977, p. 29 (emphasis added).



The FCC echoed the same theme.[28] Thus petitioners represented to this Court that *Execunet I* would result in rapid expansion of Execunet service, with significant adverse impact on AT&T—a development which could occur only if AT&T is required to provide the interconnections MCI needs for Execunet.

MCI was therefore shocked when it received—only a few hours after the announcement of this Court's denial of the petitions for a writ of certiorari—a pleading from AT&T entitled "Petition for a Declaratory Ruling and Expedited Relief." That document informed MCI that AT&T would provide no more interconnections for Execunet and sought from the Commission a ruling that AT&T was under no obligation to provide such interconnections. MCI opposed the petition, and itself petitioned the Commission for an order directing AT&T to comply with the mandate of the court of appeals in *Execunet I*. The AT&T petition was also opposed by the Department of Justice which stated:[29]

> The Department of Justice reads the *Execunet* decision as affirming the principle that communications carriers, including AT&T and MCI, may offer a full range of telecommunications services under present law and present communications regulations.

[28] For instance, in its Petitioner's Reply of November, 1977, p. 6, n. 9, the FCC argued that *Execunet I* would "bring significant competition" to the established telephone industry.

[29] Comments of the United States Department of Justice dated January 30, 1978, p. 9.

> Without an affirmative finding that the public interest so requires, the FCC is not now free to impose service limitations on either MCI or AT&T.
>
> * * * *
>
> Recent court decisions make it clear that local telephone companies, including AT&T subsidiaries, are affirmatively obliged to offer local interconnection or loop services to other carriers, including MCI, to facilitate lawful services. *Specialized Common Carriers Services*, 29 FCC 2d 870, 940 (1971). *Bell System Tariff Offerings*, 46 FCC 2d 413, (¶ 15) (1974) aff'd sub nom *Bell Telephone Co. of Pa.* v. *FCC*, 503 F.2d 1250 (1974), *cert. denied.*, 422 U.S. 1026 (1974).

Nevertheless, the Commission, on February 23, 1978, granted the AT&T petition. Commissioner Joseph R. Fogarty dissented on the grounds that:[30]

> Clearly the D.C. Circuit's findings would be a nullity were we to deny interconnection necessary for provision of such services. *Bell System Tariff Offerings* held that *Specialized Common Carriers* mandated interconnections necessary for servi authorized therein, and the *Execunet* court found those services unrestricted. Since Execunet-type services are presently authorized, these cases read together mandate interconnection.

Immediately after the Commission announced its decision, MCI filed with the United States Court of Appeals for the District of Columbia Circuit a Motion for an Order Directing Compliance with Mandate.[31] On April 14, 1978, the D.C. Circuit, holding that the Commission's action was totally at odds with *Execunet I*, granted MCI's

[30] AT&T App. 56c.

[31] Concurrently therewith, MCI filed petitions for review of the Commission's February 23, 1978 decision.



motion.[32] That is the decision (*Execunet II*) which petitioners are asking the Court to review.

## ARGUMENT AGAINST GRANTING CERTIORARI

### Summary

The unanimous decision of the court of appeals in *Execunet II* basically rejects an attempt to circumvent the rulings in its *Execunet I* decision, with respect to which certiorari was previously denied. Not a single judge of the circuit court voted in favor of rehearing *Execunet II*. The judges of the lower court, as well as the Justices of this Court, have refused a stay of the *Execunet II* decision.

There is no constitutional question at stake. Indeed, there is not even a real question of statutory interpretation involved. The court below did not have to reach the question of whether Section 201 of the Communications Act of 1934, 47 U.S.C. § 201, requires a hearing for an interconnection order, inasmuch as it found that previous interconnection orders of the Commission itself included the interconnections in question.

There is no conflict with the decision of another circuit. Both the decision below and the Third Circuit decision in *Bell Telephone* firmly rejected efforts by AT&T to refuse interconnections to MCI. Petitioners rely unconvincingly on a distorted interpretation of dicta in *Bell Telephone* which has been rejected for sound reasons by the lower court.

When AT&T petitioned for certiorari with respect to *Execunet I*, it represented to this Court, as one of its principal arguments, that MCI would immediately expand its Execunet service at a very rapid rate and thereby divert revenue from AT&T. Without intercon-

[32] AT&T App. 1a.

nections from Bell, however, it would have been utterly impossible for MCI to expand Execunet, so AT&T's representations constituted an implicit admission that it was required to provide such interconnections, absent reversal of *Execunet I*. But just hours after the Court denied certiorari, AT&T suddenly announced that it did not have any such obligation to interconnect—a position not only inconsistent with its representations to the Court but one which meant that the preceding two and a half years of litigation had absolutely no significance, making a travesty of the rulings of the court of appeals and this Court. Clearly, sound judicial administration requires that parties not be allowed to profit from such dissimulation, or from the holding back of arguments for future defense of noncompliance with judicial decisions.

This is particularly true where, as here, the argument now advanced is premised upon a rationale which was rejected in the first decision. Central to the position of petitioners, in both *Execunet I* and *Execunet II*, is the mistaken claim that certain services were excluded from the purview of the 1971 Commission's *Specialized Carrier* decision. This contention was laid to rest by the court in *Execunet I*. However, petitioners are here trying to unearth it once more—to evade the court's rulings and to achieve the very same result that was found unlawful in the first instance. The lower court acted in *Execunet II* to protect its earlier mandate from such sophistic trifling.

Similarly, AT&T now argues that the Third Circuit has exclusive jurisdiction of the case, despite the fact that it never made this claim below—and never moved to transfer the case to the Third Circuit. AT&T may well have realized that the Third Circuit, which denied it the right to refuse MCI interconnections for FX and CCSA, was not likely to let it get away with refusing interconnections for Execunet. Having made its decision to accept the jurisdiction of the D.C. Court, AT&T is not entitled to yet another round of repetitious litigation of this issue.



The lower court's decision does not prevent the administrative agency from considering what future action, if any, concerning the services and interconnections involved here may be in the public interest—and, indeed, the agency has already instituted such a proceeding. *MTS and WATS Market Structure*, —— FCC 2d ——, Docket No. 78-72, FCC 78-144 (adopted February 23, 1978, released March 3, 1978). That is the proper forum for any substantive arguments AT&T can make to support its desire for protected monopoly status.

### I. The Lower Court Acted Properly to Protect Its Mandate in *Execunet I*

Never once in the *Execunet I* proceedings before the court did AT&T even suggest that it was not required to provide the local interconnections that are the *sine qua non* for Execunet service.[33] Without such interconnection, the litigation over MCI's authority to provide Execunet service, which was resolved in *Execunet I*, would have been of absolutely no consequence. Indeed, in seeking a modification of the lower court's stay of the agency decision, AT&T had forcefully argued that continuation of the full stay would permit MCI to divert substantial business from AT&T.[34] And once again, when it petitioned for certiorari, AT&T, as one of its primary arguments, assured this Court that if the *Execunet I* decision were allowed to stand, the growth of Execunet service would create in a matter of months a massive diversion of MTS traffic "because the specialized carriers

[33] AT&T App. 9a.

[34] AT&T App. 5a.

have thousands of intercity circuits in operation and they utilize existing local distribution facilities already in place." [35] At the time the Court last looked at this case, everyone in the case was in apparent agreement that if the Court denied certiorari the first time it was sought, MCI would expand Execunet. Yet, within hours after this Court denied certiorari, AT&T dramatically renounced the obligation of interconnection it had assumed, and upon which all the parties and the court had relied, during the *Execunet I* litigation. Attempting to take advantage of their own earlier concession that interconnection was not an issue, petitioners now argue that in *Execunet I* the court failed to explicitly discuss interconnection. In *Execunet II*, the lower court rejected this sophistry and made it clear that its first decision "*did* clearly contemplate—by virtue of *AT&T's* representations and actions—that AT&T was required to provide interconnections for Execunet service." [36]

Furthermore, analysis of the decision of the 1978 Commission that AT&T had no obligation to furnish interconnections required for Execunet shows that it is premised on the misconception that the 1971 Commission had excluded certain services from the purview of the *Specialized Carrier* decision—a view that had already been explicitly rejected by the court in *Execunet I*. In *Execunet I*, the court had made it abundantly clear that MCI was free to introduce new services, including Execunet, on the lines which had been certificated pursuant to the *Specialized Carrier* decision—unless and until the agency made a public interest finding to the contrary in an appropriate proceeding. The 1978 Commission, however, simply ignored this holding when it stated its rationale for concluding that AT&T had no obligation

[35] AT&T Petition for a Writ of Certiorari of September, 1977, page 29.

[36] AT&T App. 9a (emphasis in original).



to furnish interconnections for Execunet. It reasoned as follows in paragraph 59 of its decision:[37]

> We believe it is clear that the *Specialized Common Carrier* decision as well as our order in *Bell System Tariff Offerings* and the Court's decision in *Bell Tel. Co. of Pennsylvania* require interconnection for all *specialized* interstate communication services, including switched digital services such as those developed by Datran. What is germane to the present proceeding, however, is a determination as to what services were explicitly *excluded* from consideration in *Specialized Common Carrier, Bell System Tariff Offerings*, and *Bell Tel. Co. of Pennsylvania*. We believe it is clear that MTS and WATS services, and therefore services by other names which are the functional equivalent of MTS and WATS, were excluded from both the considerations and holdings of these proceedings. The interconnection discussion in those opinions can only be read to mean that all telephone companies are required to provide facilities and interconnections which the specialized common carriers may need to provide both conventional private line services and new specialized services which may differ from any private line service which was being offered by the established carriers in June 1971.

The majority of the 1978 Commission thus chose to disregard the observation of Commissioner Fogarty that:[38]

> We are bound, therefore, by the law of the case, and we are now required to interpret the *Specialized Carrier* decision in light of the D.C. Circuit's *Execunet* holding.

Commissioner Fogarty further observed that:[39] "Clearly, the D.C. Circuit's findings would be a nullity were we

[37] AT&T App. 35c (emphasis in original).

[38] AT&T App. 56c.

[39] *Id.*

to deny interconnection necessary for provision of such services."

The majority of the Commission, however, indeed did attempt to reduce the court's first decision to a nullity by employing the very same erroneous reasoning previously rejected by the court to obtain the identical result—stopping MCI from providing Execunet. In so doing, however, they violated the principle that an agency "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case," [40] and has a duty to follow "everything decided, either expressly or by necessary implication." [41]

### II. There Is No Inconsistency With the Third Circuit

Both the *Execunet I* and *Bell Telephone* decisions firmly rejected efforts by AT&T to deny MCI interconnections. Petitioners rely on distorted interpretations of dicta in the 1974 *Bell Telephone* decision to allege inconsistency. The holding in *Bell Telephone* was affirmance of an FCC cease and desist order interpreting and enforcing interconnection obligations that had been imposed by the 1971 Commission in its *Specialized Carrier* decision. AT&T had been ordered by the Commission to cease and desist from denial or unreasonable delay in establishing connections with specialized carriers for their presently or hereafter authorized interstate and foreign communications services.[42] The Third Circuit affirmed this determi-

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[40] *City of Cleveland* v. *FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977), quoting *Yablonski* v. *UMW*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), quoting *Thornton* v. *Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

[41] *City of Cleveland*, *supra* at 348, quoting *Munro* v. *Post*, 102 F.2d 686, 688 (2d Cir. 1939).

[42] *Bell System Tariff Offerings*, 46 FCC 2d 413, 438 (1974).



nation. The only qualification it stated was with respect to "the types of services that AT&T will be required to provide 'hereafter'." [43] The limitation it read into the FCC cease and desist order was with respect to the type of interconnections Bell might be called upon to provide. These would be limited to types of interconnection furnished by local telephone companies to their affiliate—AT&T Long Lines. The context in which this limitation was framed was one in which AT&T had been attempting to make the court believe there might be some technical danger to its facilities resulting from interconnection—an allegation which subsequent experience has shown to have been utterly without foundation. The type of interconnections provided by the Bell System with respect to Execunet is no different from that provided with respect to conventional FX service—which was specifically approved in the Third Circuit case. The petitioners unconvincingly attempt to convert this minor limitation of the 1974 cease and desist order into a broad limitation upon the kinds of services specialized carriers may provide to their customers even with types of interconnection which concededly are similar to those received by Long Lines. Furthermore, the Third Circuit concluded that the prime concern of the Commission in framing its interconnection order was to prevent local telephone companies from treating AT&T's Long Lines Department differently than it treats the specialized carriers.[44] Thus, the types of interconnections required for Execunet, which are provided to Long Lines, must also be provided to MCI. Consequently, if anything, the Third Circuit decision stands in support of, and not in contravention of the *Execunet II* decision.[45]

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[43] 503 F.2d at 1273.

[44] *Id.*

[45] Counsel for the FCC introduces an interpretation, not found in the agency's 1978 decision, of the Third Circuit's treatment of

Petitioners rely heavily on the use of the term "private line" in the Third Circuit opinion. However, use of this term was to be expected inasmuch as FX and CCSA services had long been among what AT&T chose to categorize as "private line" services in its tariffs and they represented the immediate matter in dispute in the 1974 controversy. But as the 1978 Commission itself recognized in paragraph 59 of its decision, the term "private line" was used as an abbreviated expression or shorthand for a broader category:[46]

> It is true that the Specialized Carrier decision encompassed specialized communications services other than those which theretofore had been described by the established carriers as "private line" services. It is also true that in the ensuing debate and litigation regarding required interconnection arrangements, the term specialized communications service was frequently omitted in favor of the more limited term "private line." The use of this abbreviated expression apparently arose as a result of the context in which these issues were raised, i.e., whether the specialized carriers should be accorded the same interconnection rights as were accorded AT&T's internal operations in Bell's offering of "private line" services.

The ordering clauses of the 1974 cease and desist action make it abundantly clear that Bell was required

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AT&T's 1974 notice argument. But this new argument ignores the fact that the Third Circuit's conclusion with respect to the notice argument was supported more broadly by the Third Circuit's interpretation of the interconnection order in the *Specialized Carrier* decision. After reviewing that order, the Third Circuit stated, 503 F.2d at 1270:

> If this passage connotes nothing else, it indicates that the Commission intended the established carriers to provide to the specialized carriers the same services (at the same rates) as those provided to AT&T's affiliates. . . . Accordingly, we reject the alternate contention that AT&T did not receive the requisite notice in Docket No. 18920 (1971).

[46] AT&T App. 34c-35c.



to furnish interconnections to the specialized carriers for *all* their authorized services.[47] *Execunet I* established that Execunet was such a service and AT&T's obligation to provide interconnections for it necessarily followed.

### III. The Lower Court's Decision Did Not Invade the Third Circuit's "Exclusive Jurisdiction" Under the Hobbs Act

In *Execunet II*, the D.C. Circuit interpreted its own mandate in *Execunet I*. Nothing could be more clearly within the jurisdiction of the D.C. Circuit.

The Third Circuit decision upholding the 1974 cease and desist order became final years ago.[48] The Third

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[47] *Bell System Tariff Offerings*, 46 FCC 2d at 438-439. Refusal to interconnect is fundamentally inconsistent with the policy of assuring "full and fair competition" which was established in *Specialized Carrier*. Nothing could be more destructive of full and fair competition than to have one competitor, with monopoly power over facilities required for the provision of its competitor's lawful services, attempt to foreclose provision of such competing services by refusing access to the facilities required. In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377, *reh. denied*, 411 U.S. 910 (1973), the Supreme Court found unlawful the refusal to interconnect by a utility with monopoly power in one service area with smaller municipal systems requiring such interconnection. Full and fair competition requires that those who control access to an essential facility must grant access on reasonable and nondiscriminatory terms to all in the trade. *United States* v. *Griffith*, 334 U.S. 100, 107 (1948); *Lorain Journal* v. *United States*, 342 U.S. 143, 154 (1951); *United States* v. *Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912).

[48] The 1978 Commission itself, in the first footnote to its order below (AT&T App. 1c), made clear that the AT&T petition it there addressed could not properly be considered within the framework of the administrative proceeding that had given rise to the 1974 cease and desist order. It declared:

> That petition has been styled as "In the Matters Of BELL SYSTEM TARIFF OFFERINGS of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, dated October 19, 1973, to Laurence E. Harris, Vice President MCI Telecommunications Corpora-

Circuit never had the Execunet controversy before it. The 1974 cease and desist order and the later Execunet orders are quite distinct and encompass different factual and procedural backgrounds. In such circumstances, jurisdiction properly resides with the D.C. Circuit. *Midwest Video Corp.* v. *United States*, 362 F.2d 259, 261 (8th Cir. 1966). The D.C. Circuit has given full effect to the Third Circuit's decision as a final determination of the dispute which was before the latter court.

AT&T's jurisdictional argument is particularly inappropriate in view of the fact that it failed below to move to transfer this case to the Third Circuit, but instead raised its Hobbs Act [49] argument only after it had lost on the merits in the D.C. Circuit. We believe that in making its decision not to raise this argument earlier, AT&T must have realized that the Third Circuit was no more likely to let it get away with refusing Execunet interconnections in 1978 than it had been to let it refuse FX and CCSA interconnections in 1974. Clearly, AT&T is now seeking two bites from the same apple.

*City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), does not support AT&T's Hobbs Act argument. In that case, the State of Washington was held to be precluded, by virtue of a statute similar to the Hobbs Act, from attacking collaterally in a state court a Federal Power Commission order which had already been reviewed by a federal court of appeals. Indeed, the only relevance the *Tacoma* case has here is that the Court there established that a litigant may not reserve

tion, FCC Docket No. 19896." Inasmuch as Docket No. 19896 has been terminated for more than two years, the petition should have been styled as a new proceeding. The petition and all comments or other pleadings relating to this petition will be filed in the instant proceeding, which shall be considered as separate and distinct from the terminated Docket 19896 proceeding.

[49] 28 U.S.C. § 2341 *et seq.*; AT&T App. 3f.



a "point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had 'exclusive jurisdiction'. . ." 357 U.S. at 339. It is of course just such "piecemeal litigation" that petitioners have been practicing—not merely by failing to raise their Hobbs Act argument in the D.C. Circuit but, more importantly, by dissimulating their present interconnection position throughout the course of the *Execunet I* litigation.

### IV. There Was No Error in Construction of Section 201(a) of the Communications Act

Petitioners attempt to distort the question addressed below into one of whether the court of appeals deprived the telephone industry of a hearing under Section 201 (a) of the Communications Act [50] to determine whether it would be in the public interest to require AT&T to provide interconnections for use with Execunet. In framing the question in this fashion, the petitioners have ignored the fact that the telephone companies have been under a duty, imposed under Section 201, to provide interconnections for MCI ever since *Specialized Carrier*, and that this duty was reaffirmed in *Bell System Tariff Offerings* where the Commission held that "our prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services. . . ." [51]

The court of appeals held in *Execunet I* that MCI was authorized to provide Execunet, and this Court denied

[50] 47 U.S.C. § 201(a), AT&T App. 1f.

[51] 46 FCC 2d at 426.

review. Reading *Execunet I* together with the interconnection orders issued by the 1971 and 1974 Commissions, the only reasonable conclusion that can be reached is that MCI has the right to obtain from AT&T the interconnections necessary for the provision of Execunet. Since the court below found that such interconnections had already been ordered by the FCC—with the approval of the Third Circuit—it was unnecessary for it to reach the question of statutory interpretation as to whether there would be an obligation to provide the interconnections in the absence of an agency order to do so.[52]

[52] MCI believes, however, that such an obligation would exist even in the absence of an interconnection order. Section 201(a) of the Communications Act reads as follows (emphasis added):

> *It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor*; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

This section imposes two kinds of interconnection obligations on a common carrier, one requiring no hearing and the other to be imposed only after hearing. The first clause of Section 201(a), which is emphasized above, simply states the normal obligation of a carrier to provide service to all upon reasonable request. When read with Section 202 of the Communications Act, 47 U.S.C. § 202, which prohibits unjust or unreasonable discrimination, the Communications Act requires that a carrier provide service on a nondiscriminatory basis. That is the Act's clear meaning, without any need for construction. It states an obviously sound policy. Congress certainly did not intend that one requesting such service should have to go through a hearing to get it. Rather, he is entitled to service upon reasonable request—subject only to the availability of the facilities needed.

The interconnection facilities for Execunet are simply local business telephone arrangements (or business lines) which give a customer—whether a competing carrier or a local businessman—interconnection access to the local exchange. They are the same interconnections as are supplied by local telephone companies to AT&T Long Lines for its FX service which competes with MCI's Execunet.



## V. The Court of Appeals Did Not Usurp The Role of the Administrative Agency

Petitioners' invocation of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 98 S. Ct. 1197 (1978), is an exercise in irrelevance. The decision of the court of appeals here in no way interferes with the FCC's statutory obligation to inquire into the public interest and to implement any findings it makes as a result of such inquiry. Indeed, the decision encourages the agency to do exactly that. In its May 11, 1978 decision denying a stay pending consideration of new petitions for certiorari, the court stated that:[53]

> USITA emphasizes, as did the Commission and AT&T in their suggestions for rehearing *en banc*, that it is the responsibility of the Commission to determine whether competition by services such as Execunet is in the public interest. With that point we are in complete agreement. Recognition of the Commission's public interest responsibilities, however, provides no basis for upholding its February 23 declaratory ruling in view of the clear inconsistencies with the *Execunet* case. For the Commission's declaratory ruling was *not* based on considerations of the public interest, and it in no way reflected a Commission decision that expansion of Execunet service would adversely affect the public interest. Rather, it reflected only the Commission's interpretation of the statutory provisions of the Communications Act and of earlier decisions rendered by the Commission, the Third Circuit, and, most importantly, this court in *Execunet I*. Indeed, it was the Commisison's prohibition of Execunet service without any consideration of the public interest in the first instance which led to this long series of litigation.

The decision of the court of appeals does not decide basic questions of public policy or establish new proce-

[53] AT&T App. 8b-9b.

dural rules. The court has explicitly left all public interest determinations to be made by the agency. The agency is now in the initial stages of a proceeding in which those public interest determinations will be made. *MTS and WATS Market Structure, supra.*[54] All the court

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[54] Congress is also in the process of considering these public interest questions. AT&T has for some time been employing its substantial political influence to gain Congressional aid in its efforts to perpetuate its *de facto* monopoly and eliminate all competition. It succeeded in having proposed legislation introduced to accomplish this objective. S. 3192, 94th Cong., 2d Sess. (1976); H.R. 12323, 94th Cong., 2d Sess. (1976); S. 530, 95th Cong., 1st Sess. (1977); H.R. 8, 95th Cong., 1st Sess. (1977). Among other things, AT&T's proposed legislation would prevent MCI and the other specialized carriers from providing even the traditional forms of private line service to which it has long contended they should be limited. Indeed, AT&T's proposed legislation would limit the specialized carriers to services which cannot be provided by AT&T and would make it well nigh impossible for MCI to obtain authorization to do even that much. AT&T's efforts, however, have not been successful. On June 7, 1978, the Chairman and ranking minority member of the Subcommittee on Communications of the House Interstate and Foreign Commerce Committee introduced H.R. 13015, the "Communications Act of 1978." Section 331 thereof provides that:

> In the exercise and performance of its powers and duties under this part, the Commission shall—
>
> (1) place maximum feasible reliance on marketplace forces to achieve the purposes of this part;
>
> (2) promote the maintenance of nationwide basic voice telephone service at affordable rates achieved by regulation (when marketplace forces are deficient) which provides for equitable treatment of all common carriers and by direct assistance where appropriate;
>
> (3) rely on competition to provide efficiency, innovation, and low rates, and to determine the variety, quality, and costs of telecommunications services;
>
> (4) establish full and fair competitive conditions; and
>
> (5) prevent practices which would allow any carrier to limit or exclude competition in the provision of telecommunications services.

This is a ringing declaration that sound public policy requires maximum reliance on competition in telecommunications.



did was to inform the Commission that the public interest determinations necessary for a limitation of MCI's Execunet service had not yet been made and that MCI was therefore authorized to provide Execunet at the present time and had a right to the necessary interconnections from the telephone industry.

## CONCLUSION

The Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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